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Supreme Court of the United States

OCTOBER TERM, 1949

No. 148

WATCHTOWER BIBLE AND TRACT SOCIETY, INC.
Petitioner

v.

COUNTY OF LOS ANGELES, CALIFORNIA,
CITY OF LYNWOOD, CALIFORNIA, and
H. L. BYRAM, County Tax Collector,
Los Angeles County, California
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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H. L. BYRAM, County Tax Collector,
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Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Hayden C. Covington, on behalf of Watchtower Bible and Tract Society, Inc., seeks the issuance of a writ of certiorari to review the judgment entered in this case on April 29, 1950, by the United States Court of Appeals for the Ninth Circuit, affirming the judgment of the United States District Court for the Southern District of California, rendered against petitioner.

OPINIONS BELOW

The district court rendered its opinion May 26, 1949. (24-28)[1] It is not reported. The opinion of the court of appeals is not yet reported. It appears in the record. (70-74)

JURISDICTION

The judgment of the court of appeals was entered on April 29, 1950. (75) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 28 U. S. C. § 1254 (1).

QUESTIONS PRESENTED

1. Whether the California Revenue and Taxation Code and the ad valorem personal property tax assessed thereunder, as applied to the facts of this case, abridge freedom of press and freedom of worship, contrary to the First Amendment, because they have taxed literature necessary for use in worship by petitioner, a society of missionary evangelists, in door-to-door preaching, such literature being stored for immediate use at the distribution depot of petitioner.

2. Whether the separation of church and state doctrine, implicit in the First Amendment, withdraws from petitioner the protection of the explicit provisions of the First Amendment against abridgment of religion, which in this case is an ad valorem tax upon religious literature.

[1] Figures appearing in parentheses refer to pages of printed transcript of record.

This first question above stated was raised by the same petitioner against the same respondents in the California courts, resulting in an adverse decision. (*Watchtower Bible and Tract Society, Inc.* v. *County of Los Angeles*, 30 Cal. 2d 426, 182 P. 2d 178) This Court refused to review the decision on petition for writ of certiorari with Mr. Justice Murphy dissenting. (332 U. S. 811) The "denial of certiorari by this Court in the earlier case imported no expression of opinion on the merits". *Sunal* v. *Large*, 332 U. S. 174, 181; *House* v. *Mayo*, 324 U. S. 42, 48.

"Nothing is more basic to the functioning of this Court than an understanding that denial of certiorari is occasioned by a variety of reasons which precludes the implication that were the case here the merits would go against the petitioner. Petitions may have been denied because, even though serious constitutional questions were raised, it seemed to at least six members of the Court that the issue was either not ripe enough or too moribund for adjudication; that the question had better await the perspective of time or that time would soon bury the question or, for one reason or another, it was desirable to wait and see; or that the constitutional question was entangled with non-constitutional issues that raised doubt whether the constitutional issue could be effectively isolated; or for various other reasons not relating to the merits. Divergent and contradictory reasons often operate as to the same petition and lead to a common vote of denial. The want of explanations for denials of certiorari is in part due to the fact that a collective reason frequently could not be given." *Darr* v. *Burford*, 70 S. Ct. 587, 602, Mr. Justice Frankfurter, dissenting.

STATUTES INVOLVED

The provisions of the California Revenue and Taxation Code, authorizing the ad valorem tax, here drawn in question, are as follows:

Sec. 106. "Personal property" includes all property except real estate. California Revenue and Taxation Code.

Sec. 201. All property in this State, not exempt under the laws of the United States or of this State, is subject to taxation under this code. California R. and T. Code.

Sec. 401. Except as provided in this part, all taxable property shall be assessed at its full cash value. California R. and T. Code.

Sec. 2151. The board of supervisors shall fix the rate of county and district taxes and shall levy the State, county and district taxes as provided by law. California R. and T. Code.

Sec. 2602: Taxes to be collected. "The tax collector shall collect all property taxes except as otherwise expressly provided."

Sec. 2903: Collection by assessor. The assessor may collect taxes on unsecured property.

CONSTITUTIONAL PROVISIONS INVOLVED

The First and Fourteenth Amendments to the United States Constitution, protecting fundamental freedoms, are relied upon.

STATEMENT

Petitioner is a New York membership corporation formed and operated for the purpose of directing the preaching activity of Jehovah's witnesses and supplying them with literature to carry on door-to-door evangelistic work in California and elsewhere in the United States. (30-31) Petitioner is authorized to do business in the State of

California, having fully complied with the foreign corporation statute of the State. (31)

Petitioner owns and operates a storage depot where Bibles and Bible literature are kept and redistributed by it to ministers of the gospel and evangelists executing the corporate purposes of the society by preaching and carrying on missionary work in California and other states in the western part of the United States. The literature redistributed from said depot to said missionaries and ministers contains information and opinion in the form of printed sermons on Bible subjects, necessary as a substitute for oral sermons in their preaching work publicly and from door to door. (32-34)

None of said literature is sold commercially. It is stored in the redistribution depot in anticipation of redistribution to such ministers, missionaries and evangelists in the field representing petitioner. (35)

In 1947 the assessor for the County of Los Angeles entered the above-described literature, then stored at the depot, on the tax assessment rolls of the County of Los Angeles. (34-35) The tax collector mailed petitioner a tax bill in the amount of $292.85. The taxes were paid under written protest which alleged the unconstitutionality of the statutes and the tax on the ground that they deprived petitioner of its rights of freedom of press and of worship, contrary to the First and Fourteenth Amendments to the United States Constitution. (36-37)

The taxes were not paid voluntarily, but under duress[2], since it was necessary to pay the taxes in order to prevent the sale of the personal and real property belonging to petitioner. (38)

Petitioner filed a complaint in the District Court for

[2] The federal courts have jurisdiction to compel the repayment of taxes paid under duress. Stratton *v.* St. Louis Southwestern Ry. Co., 284 U. S. 530; Ward *v.* Board of County Commissioners, 253 U. S. 17; Muskogee County *v.* United States, 133 F. 2d 61, cert. denied 319 U. S. 745.

the Southern District of California on November 16, 1948. (2-16) The action was brought for the purpose of compelling the repayment of taxes assessed and collected by the respondents and which were paid by petitioner under duress, upon literature stored in petitioner's redistribution depot in Lynwood. The complaint contended that the statute authorizing the taxes and the taxes assessed and collected were void and unconstitutional because abridging petitioner's rights to freedom of press and freedom of worship, contrary to the First and Fourteenth Amendments to the United States Constitution and the Civil Rights Act. (2-16)

Although the jurisdictional amount of Three Thousand Dollars ($3,000.00), exclusive of interest and costs, was not alleged, it was claimed by petitioner that the court nevertheless had jurisdiction to entertain the action for the collection of the taxes in the amount of $292.85 on the ground that the cause of action arose under the Civil Rights Act and that jurisdiction of the district court existed by reason of Title 28, United States Code, Section 1343 (3). (2-3, 14-15)

The cause was heard before the court upon stipulation of fact. (56-61) Exhibits were received into evidence. (48-55) The trial court made specific findings of fact which conformed to the stipulation of the parties. (30-39) The trial court concluded that the jurisdiction of the federal court existed under the Civil Rights Act. (25-26)

The judgment of the trial court was that petitioner take nothing by its suit and that the action be dismissed. (40-41) The judgment of the trial court was duly appealed to the court of appeals. (41-44) Points to be relied upon were duly filed. (63-64) The cause was submitted, following oral argument, on March 23, 1950. (69)

The court of appeals thereafter filed an opinion. (70-74) That court held that petitioner was entitled to claim the rights guaranteed by the First Amendment and that the federal courts had jurisdiction under the Civil Rights Act. (71) The court concluded that because money derived from the ad valorem tax was used to provide police and fire protection for the community where the depot was located the tax differed "from the license fee directly laid on one of Jehovah's Witnesses in *Murdock* v. *Pennsylvania,* 319 U. S. 105, 116", notwithstanding the fact that the license tax in the Murdock case was to pay for "protecting those on the streets and at homes against the abuse of solicitors." (71-72) The court relied on the dictum in the cases of *Murdock* v. *Pennsylvania,* 319 U. S. 105; *Grosjean* v. *American Press Company,* 297 U. S. 233; and *Follett* v. *McCormick,* 321 U. S. 573. (72-73) The court adopted the language of the holding of the Supreme Court of California in *Watchtower Bible and Tract Society* v. *County of Los Angeles,* 30 Cal. 2d 426, 182 P. 2d 178. (73-74) The court of appeals then held that to grant the relief prayed for by petitioner would be unconstitutionally aiding the petitioner to "spread their faith". The court said: "Such aid was held by the Supreme Court in *McCollum* v. *Board of Education,* 333 U. S. 203, 210, to be 'under the ban of the First Amendment (made applicable to the States by the Fourteenth) as we interpreted it in *Everson* v. *Board of Education,* 330 U. S. 1, 15, 16.'" (74)

The court entered a judgment affirming the judgment of the district court dismissing the action. (75)

SPECIFICATION OF ERRORS TO BE URGED

The court of appeals erred

(1) In holding that the decisions of this Court are that an ad valorem tax on literature used by a preacher in preaching is not an unconstitutional burden upon freedom of press and worship, contrary to the First and Fourteenth Amendments.

(2) In holding that the tax defrayed part of the expense of police and fire protection to the depot and literature stored therein, and that such services are not required to be gratuitously supplied to petitioner.

(3) In holding that the separation of church and state doctrine withdrew from the petitioner the protection of the First Amendment because to declare the tax invalid would be to aid one of the "religious groups to spread their faith", contrary to the holding of this Court in *McCollum* v. *Board of Education,* 333 U. S. 203, 210.

(4) In failing to hold that the statutes and the tax abridge freedom of press and of worship, contrary to the First and Fourteenth Amendments.

(5) In failing to reverse the judgment of the district court.

(6) In affirming the judgment of the district court dismissing the action.

REASONS RELIED ON FOR GRANTING THE WRIT

I

It is vital that this Court review this case because the decisions of the courts below imperil the uniform practice throughout the United States of granting religious exemption from taxation. Each of the forty-eight states and the District of Columbia grant exemption to religious organizations from the payment of taxes.

If it is unconstitutional to afford exemption from taxation because such would be aiding a religious group by the state in violation of the separation of church and state doctrine enunciated by the Court in *McCollum* v. *Board of Education,* 333 U. S. 203, 210, as the court below held (74), then hundreds of thousands of churches in this country have suspended over them a sword of Damocles. It never has been thought that the churches were standing on such unstable grounds or that the authors of the Constitution intended to stretch the separation of church and state doctrine that far.

All that is involved here is the ad valorem tax upon personal property. It is true that every church of the country will not be greatly burdened by a tax on such literature as may be found in the churches. But the fact remains that the doctrine of separation of church and state as interpreted by the court below precludes the states from exempting in their constitutions religious organizations from real estate taxes. This is the result of the decision below when it is logically extended.

Not only are the legislative and constitutional policy of all the states and the District of Columbia imperiled by the doctrine of the decision below but also the welfare of all the churches is affected and imperiled. Should the prin-

ciple announced by the court below be allowed to stand, it will give rise to further discriminations and denials. The principle announced below in effect repeals completely the constitutional provisions of all of the states and the Act of Congress exempting religious organizations in the District of Columbia from taxation.

The holding of the court below that the doctrine of separation of church and state precludes petitioner from claiming benefits of the First Amendment against abridgment by taxation produces an anomaly, an inconsistency and an ambiguity that affects indirectly now and ultimately directly the rights and liberties of all of the religious organizations in the United States and the people who attend, belong to or support such organizations.

The construction placed on the First Amendment so as to preclude a religious organization from claiming the benefits of the First Amendment in this case is inconsistent and creates an ambiguity that ought to be removed. This Court ought to review this case and decide once and for all whether a religious organization can be precluded from protection of the First Amendment from taxation which is claimed to abridge freedom of press and worship.

The issue of whether the state can tax religious literature used by a preacher as a part of his worship is a presently existing controversy. The perspective of time will not terminate the problem. It continues to arise and will undoubtedly increase in other parts of the country and in many of the other communities in California. The case is therefore important beyond the particular facts and parties to this litigation. The practical effect of the decision below is very extensive and justifies this Court in reviewing the case and deciding the issues involved.

II

The decisions below are in conflict with *Richfield Oil Corporation* v. *State Board of Equalization,* 329 U. S. 69. In that case it was held that the identical ad valorem personal property tax of California was invalid when applied to personal property stored on the West Coast in anticipation of shipment in foreign commerce. The decision below is in direct conflict with that holding because things used which are necessary to the enjoyment of the rights guaranteed by the First Amendment are as strongly protected from taxation as are things that move in foreign commerce protected against taxation by the "import-export clause" of the Constitution. Therefore the ad valorem personal property tax assessed against the literature in this case is as invalid as was declared to be the ad valorem tax assessed against the oil stored. This Court held:

"Article I, Section 10, Clause 2 of the Constitution provides that 'No State shall without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, . . .' [¶] . . . It is suggested, however, that the history of the Import-Export Clause shows that it was designed to prevent discriminatory taxes and not to preclude the levy of general taxes applicable alike to all goods. . . . The qualified interpretation urged upon us has therefore no substantial support in the history of the Import-Export Clause. . . . [¶] . . . We cannot, therefore, read the prohibition against 'any' tax on exports as containing an implied qualification. . . . [¶] The prohibition contained in the Import-Export Clause against taxation on exports clearly involves more than a mere exemption from taxes laid specifically upon the exported goods themselves. That is true of the constitutional prohibition against federal taxes on exports. . . . [¶] We conclude that the tax which California has exacted from appellant is an impost upon an export within the meaning of Article I, Section 10, Clause 2, and is therefore unconstitutional." 329 U. S. 69, 74, 76, 78, 82-83, 85, 86.

The action of the court below in sustaining the ad valorem tax because it was a uniform tax generally applicable to all alike, is, consequently, squarely opposed to the ruling of this Court in *Richfield Oil Corporation* v. *State Board of Equalization,* 329 U. S. 69.

III

The decisions below fail to give effect to applicable decisions of this Court holding the license tax and other taxes unconstitutional when applied to the distribution of literature, where the taxes were calculated on a uniform income or valuation basis. *Grosjean* v. *American Press Company,* 297 U. S. 233; *Murdock* v. *Pennsylvania,* 319 U. S. 105; *Follett* v. *Town of McCormick,* 321 U. S. 573.

The court below refers to certain dicta in these dicisions claiming that this Court has said that a direct tax upon literature is permissible and its not a violation of the First Amendment. This Court has not so held. It is respectfully submitted that the court below misinterpreted the dictum appearing in *Murdock* v. *Pennsylvania,* 319 U. S. 105, at pages 112, 116, and *Follett* v. *Town of McCormick,* 321 U. S. 573, at page 577.

The court below also relied on the dictum appearing in *Grosjean* v. *American Press Company,* 297 U. S. 233, where this Court said at page 250: "It is not intended by anything we have said to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for support of the government. But this is not an ordinary form of tax, but one single in kind, with a long history of hostile misuse against the freedom of the press." (73)

It is submitted that the court below misinterpreted the dictum from these decisions by the Court. When it was said by the Court that one engaged in the exercise of freedoms of speech, press and worship was liable for the pay-

ment of taxes on property, certainly the Court did not mean to say that such taxes could be imposed on *all* property, even property necessary to worship.

The basic fallacy of the decision of the court below is that since the literature is "property", it is not protected by the guarantees of freedom of press and worship. In this respect the conclusion reached is factitious. Through syllogism, beginning with false premises, the court below has reached a conclusion that removes literature entirely from the protection of freedom of the press and worship. Thus the hand of the clock has been turned back centuries to the time when literature was banned and taxed because of the novelty thereof. In that day the rulers were unable to recognize literature as a necessary, basic part of the fundamental freedoms of the people. The ghost phrase that 'personal property is not exempt from taxation' has been used to obscure the real vice of the taxes imposed against freedom of press and worship in this case.

The mere fact that literature is personal property does not withdraw it from the protecting shield of the Bill of Rights. The broad and general terms of the Bill of Rights, protecting freedom of speech, press and worship, are flexible. They protect any device which is necessary and directly used in order to properly exercise the rights guaranteed in the fundamental compact.

The prohibition against abridgment by taxation of the rights of freedom of speech, freedom of press and freedom of worship is not limited to privilege taxes and license taxes. It extends to all kinds of taxes that directly burden the exercise of the right when imposed. "No one could doubt that taxation which may be freely laid upon activities not within the protection of the Bill of Rights could—when applied to the dissemination of ideas—be made the ready instrument for destruction of that right. . . .

"The First Amendment is not confined to safeguarding freedom of speech and freedom of religion against discrim-

inatory attempts to wipe them out. On the contrary the Constitution, by virtue of the First and Fourteenth Amendments, has put those freedoms in a preferred position. Their commands are not restricted to cases where the protected privilege is sought out for attack. They extend at least to every form of taxation which, because it is a condition of the exercise of the privilege, is capable of being used to control or suppress it. . . .

". . . The First Amendment prohibits all laws abridging freedom of press and religion, not merely some laws or all except tax laws. It is true that the constitutional guaranties of freedom of press and religion, like the commerce clause, make no distinction between fixed-sum taxes and other kinds. But that fact affords no excuse to courts, whose duty it is to enforce those guaranties, to close their eyes to the characteristics of a tax which render it destructive of freedom of press and religion." *Jones* v. *Opelika,* 316 U. S. 584, 608, 609-610, Mr. Chief Justice Stone, dissenting. This dissenting opinion was made the basis of the decision vacating the judgment resulting from the majority opinion and ordering the judgment of the state courts reversed. *Jones* v. *Opelika,* 319 U. S. 103, 104.

The appellation of the Supreme Court of California, in *Watchtower Bible and Tract Society, Inc.* v. *County of Los Angeles,* 30 Cal. 2d 426, 182 P. 2d 178, followed by the court below, that the literature is mere "property" should not blind this Court and cause it not to see the real issue presented here. It is restraint and abridgment of the freedom that is prohibited by the First Amendment irrespective of the name that may be given the thing that claims the protection or the characterization placed upon the instrument of worship. "The Constitution deals with substance, not shadows. Its inhibition was levelled at the thing, not the name." *Cummings* v. *Missouri,* 4 Wall. 277, 325.

In *Associated Press* v. *N. L. R. B.,* 301 U. S. 103, 132, it is said that "The publisher of a newspaper . . . like others

. . . must pay equitable and non-discriminatory taxes on his business." The courts of the state of California and the court below simulated the circumstances in the instant case to the facts in the case of *Giragi* v. *Moore,* 301 U. S. 670, and *Arizona Publishing Co.* v. *O'Neil,* 304 U. S. 543. The decisions in both those cases are not in point and do not sustain the decision of the California Supreme Court or the court below. However, in event it is found that the decisions in the *Giragi* and *Arizona Publishing Company* cases are applicable, then petitioner says that this Court should and may reconsider and clarify the effect of its decision in *Giragi* v. *Moore.*

In that case the State of Arizona levied a tax of one per cent upon the gross receipts of various businesses in the state, including the newspaper publishing business, and required every person engaged in a business subject to such tax to obtain a license or else suffer fines and penalties.

An examination of the record in the *Giragi* case will show that the contention that the tax there involved was in violation of the Fourteenth Amendment was first raised on motion for rehearing before the Supreme Court of Arizona. Until that motion for rehearing no federal question had been raised. Consequently, when the record came before the Court on appeal, it was deficient in failing adequately to show in what respects the tax constituted a restraint upon the press.

This Court therefore dismissed the appeal in a per curiam decision for want of a substantial federal question. *Giragi* v. *Moore,* 301 U. S. 670. But the matter was disposed of on a jurisdictional statement only and the per curiam decision was not accompanied by an opinion explaining the relation of *Grosjean* v. *American Press Co.,* 297 U. S. 233, and *Associated Press* v. *N. L. R. B.,* 301 U. S. 103, to the issue involved. Petitioner believes, therefore, that the true character and effect of a tax such as that in the *Giragi* case has never been fully considered by the Court.

Nor was the true character and effect of the tax fully considered in *Arizona Publishing Co.* v. *O'Neil,* 304 U. S. 543, where this Court on appeal affirmed the judgment of the District Court of the United States for the District of Arizona upholding the same tax statute as in the *Giragi* case. This case was also decided on the jurisdictional statement and in a per curiam decision which needs clarification.

Since the *Giragi* and *Arizona Publishing Company* decisions this Court made it plain in *Lovell* v. *Griffin,* 303 U. S. 444, that the First Amendment safeguards liberty of circulation as well as liberty of publication. Petitioner believes that in the light of the *Lovell* and subsequent cases the statute in the Arizona cases was as clear a violation of the freedom of the press as is the tax in the present case.

Those engaged in "press activity", such as the newspapers and other publishers, are not exempt from ordinary forms of taxation. They are required to pay various types of taxes, federal and state, including net income taxes, capital stock taxes, social security taxes, corporate franchise taxes, real and unemployment compensation taxes. All these are the ordinary forms of taxation. But because the public press can be required to pay ordinary forms of taxation, one could not successfully contend that such newspapers and publishers could be required to pay a tax upon the distribution of their literature or the printing thereof.

Storage of the literature in question while en route from headquarters of petitioner to its missionary evangelists in various parts of California is a necessary step in the process of preaching the gospel of God's kingdom. The message as preached by Jehovah's witnesses may be likened unto a flowing stream of ideas conveyed in words on printed pages issuing constantly from presses of petitioner, and which flows to people of good-will who desire to receive the literature in millions of homes of the nation, including California.

The taxing of any step in the process of printing, pub-

lishing and distributing literature is an unconstitutional abridgment of freedom of the press. *Grosjean* v. *American Press Co.*, 297 U. S. 233, 250; *Murdock* v. *Pennsylvania*, 319 U. S. 105; *Follett* v. *McCormick*, 321 U. S. 573; *Vermont* v. *Greaves*, 112 Vt. 222, 22 A. 2d 497; *McConkey* v. *Fredericksburg*, 179 Va. 556, 19 S. E. 2d 682.

Freedom of the press is not confined to the mere printing of literature. It embraces also circulation. "Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value." Ex parte *Jackson*, 96 U. S. 727, 733; see also *Lovell* v. *Griffin*, 303 U. S. 444, 452.

Storage of the literature at the Lynwood depot by petitioner is as much as any other act a part of the process of circulation. It is as much a part of the circulation process as is the handing of a piece of literature by one of the missionary evangelists to a person as the evangelist moves from door to door in his assigned territory. Without a place to store literature the liberty of printing and distributing it would be of little, if any, value. The distributor of literature cannot carry with him on his person all of the literature which he uses in his preaching business. Of necessity he must keep an operating reserve in large quantities at some place, to be drawn upon from time to time in his process of distributing literature from door to door.

Undoubtedly the imposition of a tax against the storage of literature by the individual missionary evangelist would be an unlawful abridgment of freedom of speech, press and worship, contrary to the named constitutions. Certainly a state could not tax the literature reserve that a missionary evangelist might keep in his automobile used by him in the servicing of his missionary field. The state could not tax the literature which a missionary evangelist might have stored at his home or in his garage or in a private storage place rented by him.

Since the state concededly cannot tax the literature

stored by the individual missionary evangelist, then *a fortiori,* the state cannot lawfully tax the literature stored by two or more missionary evangelists working together and jointly. If the state cannot tax the stored literature of one evangelist, or of two, three or more missionary evangelists operating jointly, then, by force of the same reason, the state cannot lawfully impose a tax upon literature stored by a society of missionary evangelists, which literature is commonly used by the large group or society of missionary evangelists in their joint action of preaching.

Storage of literature at the Lynwood depot by petitioner is a mere convenience, essential to effective distribution of the literature. It is true that the literature could be shipped directly from the society's headquarters at New York to the individual missionary evangelists in their respective territories. However, that is not necessary because it imposes upon the society an unnecessary financial burden. It makes more costly, hence burdensome, the distribution of the literature by the missionary evangelists.

Storage of literature for redistribution to evangelists for final delivery to the people of California is as necessary a step in the process of petitioner's publishing as is the stevedoring step in the process of shipping in foreign commerce. Accordingly it should have the same exemption from taxation.

The entire flowing stream of publication must be kept open, pursuant to the mandate of the Bill of Rights and the Constitution of the United States. The protecting shield of the Bill of Rights in the Constitution extends from that stream's source to its termination, which is the delivery of the literature to the millions of recipients thereof throughout the nation, including California. The Bill of Rights in the Constitution forbids the state's erecting a dam or barrier at any point along the flowing stream of publication, which begins with printing and ends with delivery of such litera-

ture to persons of good-will at their homes or publicly upon the streets of the nation.

Publication, as a stream aflow, is kept alive by the continuing and uninterrupted gliding of literature from the printing presses to the people. If at any point the stream is dammed, it will stagnate, resulting in disease and death to the vital freedom as well as to those entitled to enjoy it.

Certainly none would have the audacity to argue that the storage of literature is not a part of the process of publishing. Can any say that the storage of literature is not a step or vital essential of the publishing process viewed as a whole and which, streamlike, must course smoothly and continuously from the printing presses to the people? The people cannot be required to stand at the printing press. Liberty of press does not end at the printing press. The people have the right to receive the literature at their homes and upon the streets of the nation. How can they receive it if they cannot have someone to deliver it to them? How can the deliverer of the literature effectively distribute it unless he has an abundance of literature to distribute? How can he have an abundance of literature to distribute unless he has a place to store it?

The mere uttering of all these questions against the sounding-board of reason reverberates the answer that storage of literature is a vitally essential part of the process of circulation of literature. Since circulation cannot be burdened by taxation, no part of the process of circulation can be impeded or stagnated by taxation.

In an analagous situation of commerce, this Court has held that the business of stevedoring, loading and unloading ships was such a vitally necessary step in the process of foreign trade that it could not be taxed by the state. *Joseph* v. *Carter & Weekes Stevedoring Company,* 330 U. S. 422, 426, 427-428. In that case the Court said: "The movement of cargo off and on the ship is substantially a continuation of the transportation. . . . The transportation in com-

merce, at the least, begins with loading and ends with unloading. Loading and unloading has effect on transportation outside the taxing state because those activities are not only preliminary to but are an essential part of the safety and convenience of the transportation itself."

Also reference is made to the dissent of Mr. Justice Douglas in that case at 330 U. S. 445. There he said: "Loading and unloading are a part of 'the exporting process' which the Import-Export Clause protects from state taxation. See *Thames & Mersey Ins. Co.* v. *United States,* 237 U. S. 19, 27. Activity which is a 'step in exportation' has that immunity. . . . And the gross receipts tax is an impost on an export within the meaning of the Clause, since the incident 'which gave rise to the accrual of the tax was a step in the export process.' *Richfield Oil Corp.* v. *State Board, supra.* [329 U. S. 69]"

There is no analogy between the long line of decisions which approve the imposition of taxes upon rolling stock of railroads and airplanes of air lines engaged in interstate commerce and the imposition of a tax against the property in this case. These vehicles of transportation are clearly subject to taxation. Certainly petitioner does not argue that the automobiles used by its missionary evangelists are exempt from the ad valorem property tax of California or the payment of automobile license tax fee required in the registration of automobiles.

The literature used in preaching the gospel of God's kingdom by Jehovah's witnesses is protected from taxation by the First Amendment. The automobile is not. It is not necessary. The literature is necessary. It is the article that gives life to the press activity protected by the Bill of Rights. It is a product and result of freedom of the press.

Certainly, it would be conceded that goods shipped in commerce are free from taxes while in transit over interstate commerce lines. The literature protected by the Bill of

Rights against taxation is as free from the ad valorem taxes as are goods in interstate transit.

The principle announced in the case of *Nippert* v. *City of Richmond*, 327 U. S. 416, applies here rather than the principle of the rolling stock cases. In that case Mr. Justice Rutledge said: "If the only thing necessary to sustain a state tax bearing upon interstate commerce were to discover some local incident which might be regarded as separate and distinct from 'the transportation or intercourse which is' the commerce itself and then to lay the tax on that incident, all interstate commerce could be subject to state taxation and without regard to the substantial economic effects of the tax upon the commerce. For the situation is difficult to think of in which some incident of an interstate transaction taking place within a state could not be segregated by an act of mental gymnastics and made the fulcrum of the tax. All interstate commerce takes place within the confines of the states and necessarily involves 'incidents' occurring within each state through which it passes or with which it is connected in fact. And there is no known limit to the human mind's capacity to carve out from what is an entire or integral economic process particular phases or incidents, label them as 'separate and distinct' or 'local', and thus achieve its desired result. . . .

"It is no answer, as appellee contends, that the tax is neither prohibitive nor discriminatory on the face of the ordinance; or that it applies to all local distributors doing business as appellant has done. Not the tax in a vacuum of words, but its practical consequences for the doing of interstate commerce in applications to concrete facts are our concern. . . .

". . . With the forces behind it, this is the very kind of barrier the commerce clause was put in the fundamental law to guard against. . . .

"The drummer is a figure representative of a by-gone day. But his modern prototype persists under more euphonious

appellations. So endure the basic reasons which brought about his protection from the kind of local favoritism the facts of this case typify." *Nippert* v. *City of Richmond,* 327 U. S. 416, 423, 431, 434, 435.

Taxation of literature is as much an abridgment of freedom of press and worship as is prohibition or censorship. *Murdock* v. *Pennsylvania,* 319 U. S. 105. All forms of burdens which may be used as instruments of destruction or as impediments to the free exercise of civil liberties by the people were contemplated by the authors of the First Amendment as within the ambit of the Amendment.

Every school child knows that the forefathers fought valiantly until they cast off and out from this land taxation of freedom as the favorite yoke of oppression. That method of abuse and prohibition of the freedom of the press was without question of doubt more clear in the minds of the framers of the First Amendment than any other sort of encroachment.

"The exigencies of the colonial period and the efforts to secure freedom from oppressive administration developed a broadened conception of these liberties as adequate to supply the public need for information and education with respect to the significant issues of the times." Murphy, J., in *Thornhill* v. *Alabama,* 310 U. S. 88. See, also, Duniway, *The Development of Freedom of the Press in Massachusetts,* p. 123 et seq.; Tyler, *Literary History of the American Revolution;* 2 Bancroft, *History of the United States,* p. 261; Schofield, *Freedom of the Press in the United States* (1914), 9 Proc. Am. Social, Sec. 67, 76, 80.

At the time of the American Revolution that was the favorite and best known means of oppression. For historical discussion of these oppressive taxes, see *Grosjean* v. *American Press Co.,* 297 U. S. 233; *Near* v. *Minnesota,* 283 U. S. 697, 707-716. See, also, W. G. Bleyer, *The History of American Journalism,* 1927 ed., 1129; G. J. Patterson, *Free Speech and a Free Press,* 1939 ed.; W. M. Clyde, *The Struggle for*

the Freedom of the Press from Caxton to Cromwell, 1934 ed.; C. D. Collet, *History of Taxes on Knowledge,* 1899 ed.; Ford, *Pamphlets on the Constitution of the United States,* 1787-1788, pp. 113, 156-157, 316 (1888); *Pennsylvania and the Federal Constitution* (McMaster and Stone, Eds.), pp. 180, 181, 576 ff. (1888); Stevens, *Sources of the Constitution of the United States,* pp. 213, 218, 221 (1894); Stewart, *Lennox and the Taxes on Knowledge,* 15 Scottish Hist. Rev. 322, 326.

The term "abridge" as used from the First Amendment means "to shorten, curtail or reduce" and comes from the same root word as "abbreviate". It does not mean "destroy, forbid, prohibit, prevent."

It cannot be contended that the tax here is not an "abridgment" of civil liberties within the prohibition of the First Amendment. The tax is more pernicious than even the ancient stamp tax because it is an arbitrary tax providing for an amount which must be paid for keeping in one's possession literature, and does not depend upon income or profit of the individual. It does not make allowance for those engaged in charitable activity where most of the items are delivered free of charge. No provision is made for any reduction in amount of tax on account of the number of pieces given away free of charge. The tax is therefore the worst kind of burden or abridgment.

In *McCulloch* v. *Maryland,* 4 Wheat. 316 (1819), it is said: "The power to tax is the power to destroy." That destruction is a grim and appalling reality in the instant case.

This entire question of whether the tax is an unconstitutional "abridgment" of the rights guaranteed by the Bill of Rights can be disposed of on that single, lone milestone of constitutional law and judicial history.

The universal rule of the courts is that when a tax is found to be proper and constitutional upon a given activity such tax cannot be attacked as a "substantial clog" or excessive. Once it is decided that a tax can be imposed upon the right to print, publish, store, circulate or distribute printed matter or to preach the gospel as did Christ Jesus and His apostles, then there is no limit to this power of taxation and complete control, suppression, and prohibition. Destruction of the four freedoms can readily result.

The courts have repeatedly pointed out that when a subject matter is brought under the taxing power of the federal, state or municipal government, the amount—regardless of how destructive or prohibitive it may be—cannot be questioned by the judiciary. There is no limit to its exercise within the discretion of the government, state or city. The oppressiveness of the burden cannot interdict the taxation. *Magnano Co.* v. *Hamilton,* 292 U. S. 40; *Stewart Dry Goods Co.* v. *Lewis,* 294 U. S. 550.

In *Veazie Bank* v. *Fenno,* 8 Wall. 533, 548, the validity of an increase in the tax on the circulating notes of persons and state banks was questioned. The Court refused to consider the question of whether the increase was excessive and said: "The first answer to this is that the judiciary cannot prescribe to the legislative departments of the government limitations upon its acknowledged powers. The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected. So if a particular tax bears heavily upon a corporation or a class of corporations, it cannot, for that reason only, be pronounced contrary to the Constitution." See also *Bailey* v. *Drexel* ("Child Labor Tax Case"), 259 U. S. 20, 41; *McCray* v. *United States,* 195 U. S. 27; *Spencer* v. *Merchant,* 125 U. S. 345; *Flint* v. *Stone Tracy Co.,* 220 U. S. 107.

IV

The decisions below fail to give proper effect to the decisions of this Court in *McCollum* v. *Board of Education,* 333 U. S. 203 and *Everson* v. *Board of Education,* 330 U. S. 1. The court below misinterpreted the holdings of this Court in these two cases. The court below held that the effect of these decisions was to preclude the court below from allowing petitioner, a religious corporation, to use the shield of the First Amendment which protects freedom of religion against abridgment on the ground that to declare the tax invalid would amount to a state subsidy to "religious groups to spread their faith," which is put " 'under the ban of the First Amendment (made applicable to the States by the Fourteenth Amendment) as we interpreted it in *Everson* v. *Board of Education,* 330 U. S. 1, 15, 16.' " (74)

The holding of the court below in this respect is out of harmony with the holding of this Court in *Murdock* v. *Pennsylvania,* 319 U. S. 105, and *Follett* v. *Town of McCormick,* 321 U. S. 573. In those cases freedom of religion was relied upon to declare the tax invalid. The tax in those cases was not a discriminatory tax. In fact in those cases the Court found that the taxes were uniform and applicable to all alike.

If the shield of the First Amendment is to be withdrawn from a religious organization when ad valorem taxes are involved then by force of the same reason the same shield must be withdrawn when license taxes are attacked.

Surely this Court did not ignore history and disregard the intent of the framers of the First Amendment when it held that Jehovah's witnesses were entitled to the protection of the freedom of religion clause in the First Amendment against taxes in the *Murdock* and *Follett* cases. If the First Amendment is available to protect a religious organization against license taxes, *a fortiori* it is available

to protect a religious organization against unlawful ad valorem taxes assessed unconstitutionally against literature used as a necessary part of preaching the good news of God's kingdom as the only hope for mankind.

The wall of separation of church and state certainly does not extend so far as to deny a religious organization the right to use the First Amendment when taxes are involved. Certainly the framers of the First Amendment did not mean to say, as the court below held, that religious organizations are protected under the First Amendment against all sorts of abridgments save and except taxation. If protection of religious organizations against abridgment by taxation was not intended by the framers, they would have written into the First Amendment that religious organizations are free from all burdens and abridgments in the exercise of their religious freedom save and except taxation. Since this proviso was not written into the First Amendment we must assume that all types of abridgments, taxation included, were and are forbidden by the First Amendment.

The discordant doctrine that the First Amendment does not protect a religious organization against abridgment by taxation of the exercise of liberties guaranteed by the First Amendment alone ought to be sufficient to lead this Court to grant certiorari and review the case. The same reasons that led the Court to review *McCollum* v. *Board of Education,* 333 U. S. 203, and *Everson* v. *Board of Education,* 330 U. S. 1, should persuade this Court to grant review here. Certainly the petitioner ought not to be required to submit to the payment of the taxes impinging, as they do, the rights guaranteed by the First Amendment, until this Court has reviewed the case and decided the questions presented here.

CONCLUSION

For the reasons above this petition for a writ of certiorari should be granted.

Respectfully submitted,

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